Yap Seng Hock v Southern Finance Bhd (previously known as United Merchant Finance Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-1129–05 OF 2013
RAMLY ALI, DAVID WONG AND ZAWAWI SALLEH JJCA
2 DECEMBER 2014

Civil Procedure — Writ of summons — Extension of — Whether writ became nullity when not served during its validity period — Whether failure to extend validity period for service of writ rendered writ invalid — Whether Federal Court's refusal of leave to appeal did not mean it approved decision of Court of Appeal sought to be appealed against

The respondent obtained a judgment in default of appearance against the appellant on the basis the writ of summons ('the writ') was personally served on him. The appellant contended he was never served with the writ and only became aware of the default judgment when he was served with a bankruptcy notice. He then applied to set aside the default judgment pointing out that the person who had signed acknowledgement of receipt on the copy of the writ was a BY Yap bearing a different NRIC number from his. The application was dismissed by the High Court but, on appeal, the Court of Appeal ('the COA') upheld the appellant's contention, set aside the default judgment and remitted the case back to the High Court for 'case management'. By that time, the six-month validity period for service of the writ had expired and the appellant asked the registrar at the 'case management' date to strike out the action on that ground. The registrar instead directed the appellant to file a defence within two weeks, which the appellant did under protest. Meanwhile, the appellant's motion to the COA to direct the respondent to serve the writ and statement of claim on him was dismissed and the Federal Court declined to grant him leave to appeal against that decision. When the appellant's application to strike out the writ and statement of claim came up for hearing in the High Court, the judge interpreted the COA's dismissal of the motion to mean there was no necessity for the respondent to re-serve the writ on the appellant. The instant appeal was against the High Court's decision.

Held, allowing the appeal with costs of RM5,000, setting aside the orders of the High Court and striking out the writ and statement of claim:

(1) As the default judgment was set aside on the ground there was no service of the writ and statement of claim, the appellant's duty to defend had not started. Valid service was a condition precedent for any subsequent action pursuant to the writ. When the Court of Appeal ('the COA') remitted the

case back to the High Court for case management, the registrar should have taken stock of the status of the writ. At that point in time, the writ had expired and no application had been made to extend its validity period. Just because the COA had remitted the case back for case management it could not be assumed that the writ, which had expired, did not have to be renewed (see paras 12–14 & 16).

(2) The writ of summons was a nullity. There was no valid document in court until the writ was renewed. There was also no valid service of the purported writ. No inherent jurisdiction was available to the courts in a circumstance when the very basic foundation of a legal suit did not exist at all (see paras 15–16 & 19).

(3) The fact that leave was not granted by the Federal Court to review the dismissal of the appellant's motion did not mean the decision of the COA had been affirmed (see para 18).

[Bahasa Malaysia summary

Responden memperolehi penghakiman ingkar kehadiran terhadap perayu atas dasar writ saman ('writ') secara peribadi diserahkan kepadanya. Perayu berhujah bahawa writ tidak pernah diserahkan kepadanya dan hanya sedar mengenai penghakiman ingkar apabila diserahkan kepadanya notis kebankrapan. Kemudiannya dia memohon untuk mengetepikan penghakiman ingkar dengan menunjukkan bahawa orang yang menandatangani penerimaan salinan writ adalah seorang yang bernama a BY Yap yang memegang nombor kad pengenalan yang berlainan daripadanya. Permohonan ditolak oleh Mahkamah Rayuan ('MR') mengesahkan hujahan perayu, mengetepikan penghakiman ingkar dan meremit semula kes kepada Mahkamah Tinggi untuk 'case management'. Pada masa tersebut, tempoh kesahan enam bulan untuk penyerahan writ telah tamat tempoh dan perayu meminta pendaftar semasa 'case management' tarikh untuk membatalkan tindakan atas alasan tersebut. Pendaftar sebaliknya mengarahkan perayu untuk memfailkan pembelaan dalam masa dua minggu, yang mana perayu lakukan dengan bantahan. Sementara itu, usul perayu ke MR untuk mengarahkan responden menyerahkan writ dan pernyataan tuntutan ke atasnya ditolak dan Mahkamah Persekutuan menolak daripada memberi izin kepadanya untuk merayu terhadap keputusan tersebut. Apabila permohonan perayu untuk membatalkan writ dan pernyataan tuntutan bangkit untuk pendengaran di Mahkamah Tinggi, hakim mentafsirkan penolakan MR terhadap usul yang bermaksud bahawa tidak perlu untuk responden untuk menyerahkan semula writ kepada perayu. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM5,000, mengetepikan perintah Mahkamah Tinggi dan membatalkan writ dan pernyataan tuntutan:

(1) Memandangkan penghakiman ingkar diketepikan atas alasan tidak terdapat penyerahan writ dan pernyataan tuntutan, tugas perayu untuk membela belum bermula. Serahan sah adalah syarat duluan untuk mana-mana tindakan selanjutnya berikutan writ. Apabila Mahkamah Rayuan ('MR') meremit semula kes kepada Mahkamah Tinggi untuk pengurusan kes, pendaftar patut mengambil kira status writ tersebut. Pada masa tersebut, writ telah tamat tempoh dan tiada permohonan telah dibuat untuk melanjutkan tempoh kesahannya. Hanya kerana MR telah meremit semula kes untuk pengurusan kes ia tidak boleh dianggap bahawa writ tersebut telah tamat tempoh, tidak perlu diperbaharui semula (lihat perenggan 12–14 & 16).

(2) Writ saman adalah tidak sah. Tidak terdapat dokumen yang sah di mahkamah sehingga writ diperbaharui. Juga tidak terdapat penyerahan yang sah mengenai writ yang didakwa tersebut. Tiada bidang kuasa sedia ada kepada mahkamah-mahkamah dalam keadaan apabila asas tindakan undang-undang langsung tidak wujud (lihat perenggan 15–16 & 19).

(3) Fakta bahawa izin tidak diberikan oleh Mahkamah Persekutuan untuk menyemak semula penolakan usul perayu tidak bermaksud keputusan MR telah disahkan (lihat perenggan 18).]

Notes

For cases on extension of writ of summons, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 10081–10087.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of The Sabah Foundation & Ors and another application [1999] 1 MLJ 257; [1999] 1 CLJ 325, FC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)

Appeal from: Suit No MT3–22–812 of 2003 (High Court, Shah Alam)

Harpal Singh Grewal (J Amardas and Reny Rao with him) (KP Ng & Amardas) for the appellant.

P Mithran (K Sureindhren with him) (Sothi & Ang) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge dismissed the appellant/defendant's application to set aside a judgment in default of appearance obtained by the respondent/plaintiff premised on two grounds namely, that the writ of summons was never served on the appellant and in any event the writ of summons had expired at the material time ('the judgment').

[2] We heard the appeal and after due consideration to respective submissions of counsel, we allowed the appeal and now give our reasons.

BACKGROUND FACTS

[3] The respondent had obtained a judgment in default of appearance on 25 March 2004. The premised judgment in default is that the writ of summons had been served on the appellant.

[4] The appellant had always disputed that the writ of summons had not been personally served on him and only became aware of the judgment in default when a bankruptcy notice was served on him on 21 January 2010.

[5] Upon being aware, the appellant filed in an application to set aside the judgment in default on 20 July 2010 which was dismissed by the High Court at Shah Alam on 23 August 2010. The grounds upon which the appellant premised his application were that he was not served with the writ of summons, and that it was received by one BY Yap, bearing IC No 5008831, who is not the appellant. The appellant has an IC bearing No 450329–04–5107 with an old IC number of 0189908.

[6] The respondent's contention of service is premised on an endorsement on the writ of summons which was acknowledged by one BY Yap, bearing IC No 5008831, as the person who had been served with the writ of summons.

[7] The appellant appealed against the dismissal of the application to the Court of Appeal which allowed the same with costs. The ground of this court reads as follows:

> The judgment in default of appearance is premised on the personal service of the plaintiff's writ of summons and statement of claim on the defendant. We need only to deal with this issue. Upon a proper perusal of the relevant documents in the appeal record we find that the plaintiff has not fulfilled the requirements for personal service. We are therefore of the view that the judgment in default of

appearance has not been regularly obtained. It has therefore to be set aside ex debito justitae. We allow the defendant's appeal. The case is remitted to the High Court for case management. Costs in the cause. Agreed costs of RM5,000 in the course here in the court below.

[8] When the suit was remitted to the High Court for case management on 29 June 2012, the appellant informed the learned senior assistant registrar that the writ of summons had not been served on the appellant and that the writ of summons had expired, and asked for the action to be struck off. The learned senior assistant registrar did not accede to the request of the appellant, but instead directed the appellant to file in a formal application by 30 July 2012 and also directed that the defence be filed within two weeks.

[9] The appellant filed in the defence under protest and also filed in an application to strike out the writ of summons and statement of claim. When the application to strike out came up before the High Court for hearing, the learned judge was of the view that the main issue for determination is what did the Court of Appeal meant by 'case management'.

[10] The appellant then filed a motion on 30 November 2012 to the Court of Appeal to direct that the respondent to serve the writ of summons and statement of claim on the appellant. This motion was dismissed on 12 December 2012 but with regret we are not informed of the reasons. The learned judge interpreted the Court of Appeal's dismissal of the motion as to mean that there is no necessity to re-serve the writ of summons. The appellant had also filed a motion at the Federal Court to review the Court of Appeal's dismissal of the motion but was unsuccessful.

THE RESPONDENT'S SUBMISSION

[11] Premised on the conducts of the appellant, it is the submission of the respondent that the appellant is estopped from raising the issue of service of the writ of summons and statement of claim. Learned counsel refers us to the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 where it was held at pp 199–200 (MLJ); p 793 (CLJ):

> On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawdor v Gray*

[1984] 3 All ER 345 at p 350 who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action'.

OUR GROUNDS OF DECISION

[12] We start our deliberation on the undisputed fact that the judgment in default was set aside on the ground that there was no service of the writ of summons and the statement of claim. In short, the appellant's duty to defend had not started. When the Court of Appeal remitted back to the High Court for case management, we are of the view that the learned senior assistant registrar should have taken stock of the status of the writ of summons.

[13] At that point in time, there is no dispute that the writ of summons had expired; in short there is no writ of summons in existence. To recap, the date of the writ of summons is 19 September 2003 with a life span of six months. And when the same was remitted back to the High Court for case management by the Court of Appeal on 29 June 2012, that writ of summons had undoubtedly expired where there had not been any extension applied for. Hence, we also cannot understand as to why the 'very existence' of the writ of summons was not considered at all.

[14] Just because the Court of Appeal remitted the suit back for case management, there cannot be any assumption that the writ of summons which had expired need not to be renewed. We can do no better than to refer to the Federal Court case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149 at pp 157–158 ; [2009] 4 CLJ 329 at p 338, para 21 where the then Chief Justice Zaki Tun Azmi said:

> [21] In *Battersby and Others v Anglo-American Oil Company ltd and Others* [1944] 2 All ER 387, Lord Goddard held that the issue of a writ becomes a nullity by reason of non-service within the prescribed time. At p 389F, he said:
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> If the writ had ceased to be in force, the position is the same as if it had never been issued.
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> [22] I therefore agree with the views of Skinner J in *Mayban Finance Bhd v Umas Sdn Bhd* [2002] 4 MLJ 276 (see pp 287–288) in following *Battersby & Ors v Anglo-American Oil Company Ltd* [1945] 1 KB 23 at p 23, where he cited what Lord Goddard had to say on the matter of the renewal of a writ:
>
> We conclude by saying that, even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ

> to serve it promptly. And renewal is certainly not to be granted as of course on an application which is necessary made ex parte. In every case, care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case, if should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as indeed, is laid down in order.
>
> It is therefore clear from the case above that the writ is a nullity, and as it has not been extended and nor has it been served.

[15] From the above and basic principles, what we have here is a nullity and that simply means is that 'there is no valid document in Court' until the writ of summons has been renewed.

[16] Not only that the writ of summons is a nullity, there is no dispute that there has not been any valid service of the purported writ of summons. Valid service on the appellant is a condition precedent for any subsequent action pursuant on the writ of summons.

[17] In coming to our decision, we appear to take a different stand to another panel of this court. As intimated by us earlier, we are not quite clear as to why the Court of Appeal did not accede to the appellant's motion to order that a valid writ of summons be served on the appellant. It could very well be that the panel did not want to interfere with or reinterpret the first order of the Court of Appeal to remit the suit back to case management and hence dismissed the motion.

[18] Further, we are of the view that the fact leave was not granted by the Federal Court to review the dismissal of the motion does not mean that the decision of the Court of Appeal had been affirmed. We can do no better than refer to the case of *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of The Sabah Foundation & Ors and another application* [1999] 1 MLJ 257; [1999] 1 CLJ 325 where the Federal Court through the judgment of Edgar Joseph Jr FCJ opined as follows:

> Having said that, we hasten to add, in the words of Lord Diplock peaking in the House of Lord in *Modern Engineering v Gilbert-Ash* [1974] AC 689 at pp 715–716: 'Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against. That judgment carries the same authority as any other unappealed judgment of the Court of Appeal — neither more or less'. With this statement of principle we respectively agree. The natural tendency, therefore, to claim that a judgment of the Court of Appeal which has been the subject of an unsuccessful application for leave carries greater authority than one which has gone unchallenged, must be resisted.

[19] It is our view that because of the undisputed nullity of the writ of summons which is the very basic foundation of a legal suit, we, with respect, saw fit to take a different course of action to that of another panel of this court. There is no and cannot be any inherent jurisdiction available to the courts in a circumstance when the very basic foundation of a legal suit did not exist at all.

CONCLUSION

[20] For reasons stated above, we allowed the appeal with costs in the sum of RM5,000 for here and below. We also set aside the orders of the High Court and ordered that the deposit to be refunded to the appellant. Accordingly, the writ of summons and the statement of claim dated 19 September 2003 were struck out.

Appeal allowed with cost of RM5,000, orders of the High Court set aside and writ and statement of claim struck out.

Reported by Ashok Kumar